IN THE

Supreme Court of the United States

No. 426

COLEMAN ULLNER,

Appellant,

v.

THE STATE OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Jurisdictional Statement	1
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement of the Case	5
The Questions are Substantial	7
Previous Consideration of Sunday Blue Laws by This Court	8
The Recurrence of a Question Has Been Recognized By This Court as a Ground for Consideration on the Merits	10
The Ohio Blue Laws are Laws Respecting the Establishment of Religion	11
The Statute as Interpreted by the Supreme Court of Ohio Is Not So Explicit That All Men Subject to Their Penalties May Know What Acts It Is Their Duty to Avoid	13
The Provisions of Sections 3773.24 and Related Sections of the Revised Code of Ohio Are Unduly Discriminatory	15
The Appellant Is Denied the Equal Protection of the Law By Reason of the Arbitrary Enforcement Against Him While Violations By the General Public Are Consistently and Deliberately Disregarded	17
Conclusion	18
Appendices	1a

PAGE

Appendix A—Opinion of Supreme Court of Ohio, 167 O. S. 521, 150 N. E. (2d) 413 (1958) 1a

Appendix B—Opinion of Court of Appeals of Butler County, Ohio, 143 N. E. (2d) 849 12a

Appendix C—Opinion of Common Pleas Court of Butler County, Ohio 17a

Appendix D—Opinion of Municipal Court, City of Hamilton, Butler County, Ohio 18a

Appendix E—Judgment Entries in the Supreme Court of Ohio 27a

Appendix F—Entries of the Supreme Court of Ohio Denying Application for Rehearing 28a

Appendix G—Texts of Statutes Involved 29a

Sec. 3773.23 29a

Sec. 3773.25 29a

Sec. 3773.26 29a

Sec. 3773.99 29a

Sec. 4107.46 30a

Sec. 4109.22 32a

Sec. 4301.03(I) 34a

Sec. 4301.22(D) 34a

INDEX OF CASES

Abie State Bank v. Bryan, 282 U. S. 765 18

Board of Education v. Barnette, 319 U. S. 624 13

Brown v. Board of Education, 347 U. S. 483 11

Cantwell v. Connecticut, 310 U. S. 296 13

Champlin Rfg. Co. v. Commission, 286 U. S. 210 15

Connally v. General Const. Co., 269 U. S. 385 15

Cumberland Coal Co. v. Board, 284 U. S. 23 3, 18

PAGE

Iverson v. Board of Education, 330 U. S. 1 13

Itlow v. New York, 268 U. S. 652 8

Irochowiak v. Pennsylvania, 184 Superior Court 522, 136 A. (2d) 145, No. 166 October Term 1958 10

Iundaker Central Motors Inc. v. Gassert, 23 N. J. 71, 127 A. (2d) 566, Appeal dismissed 354 U. S. 933 9

Ienderson v. Antonacci, 62 S. (2d) 5 16

Iennington v. Georgia, 163 U. S. 299 8

Iickenbotham v. Williams, 227 Ark. 126, 296 S. W. (2d) 897, *certiorari* denied 353 U. S. 961 9

ones v. Opelika, 319 U. S. 103 13

Kelly v. Blackburn, 95 S. (2d) 260 16

Lanzetta v. New Jersey, 306 U. S. 451 3, 15

McCollum v. Board of Education, 333 U. S. 203 3, 13

Morey v. Doud, 354 U. S. 457 16

Murdock v. Pennsylvania, 319 U. S. 105 13

Musser v. State, 333 U. S. 95 14

Patterson v. Colorado, 205 U. S. 454, 462 8

People v. Friedman, 302 N. Y. 75, 96 N. E. (2d) 184, Appeal dismissed 341 U. S. 907 9

Petit v. Minnesota, 177 U. S. 164 8

Prudential Ins. Co. v. Check, 295 U. S. 530, 543 8

State, ex rel. Canada v. Phillips, 168 O. S. 191, 151 N. E. (2d) 722 7

Superior Films v. Department of Education of Ohio, 346 U. S. 587 3

Taylor v. Pine Bluff, 226 Ark. 309, 289 S. W. (2d) 679, *certiorari* denied 352 U. S. 894 9

Teamsters Union v. Vogt, Inc., 354 U. S. 284, 77 S. Ct. 1166 10

PAGE

United States v. Ballard, 322 U. S. 78 13

United States v. Brewer, 139 U. S. 278 13

United States v. Cohen Grocery Co., 255 U. S. 81 14

Winters v. New York, 333 U. S. 507 ..... 2, 15

Yick Wo v. Hopkins, 118 U. S. 356 ..... 3, 18

Zorach v. Clauson, 343 U. S. 306 ..... 2, 13

INDEX OF STATUTES

Revised Code of Ohio:

Sec. 1541.07 17

Sec. 3773.23 ..... 3, 11, 12, 15

Sec. 3773.24 ..... 3, 4, 11, 12, 15

Sec. 3773.25 ..... 3, 11, 17

Sec. 3772.26 ..... 3, 11, 12, 15

Sec. 3773.99 3

Sec. 4107.46 ..... 3, 16

Sec. 4109.22 ..... 3, 16

Sec. 4301.03(I) 3, 15

Sec. 4301.22(D) 3, 15

Constitution of the United States of America:

First Amendment 4, 5, 7, 8, 9

Fourteenth Amendment 4, 5, 7, 8, 13, 18, 19

1 Laws of the North-West Territory 27 11

Supreme Court of the United States, Rule 15, Subparagraph 3 1

Title 28, United States Code, Section 1257(2) 2

OTHER AUTHORITIES

American State Papers, Class VII, Post Office Department, 211, 212 and 229-31 12

PAGE

American State Papers and Related Documents on Freedom of Religion, 4th Revised Edition, 210 ... 12

A Critical History of Sunday Legislation, pp. viii and ix of Preface ... 12

Lever Act, Section 4 of the Federal Food Control Act of 1917 As Amended in 1919 ... 14

52 Liberty, a Magazine of Religious Freedom, 26 (First Quarter 1957) ... 12

Editorial Note, "Sunday Blue Laws: An Analysis of their Position in our Society," 12 Rutgers Law Review 505 (Spring 1958) ... 11, 18

"Sunday Statutes in a Modern Community," 61 Yale Law Journal 427 ... 11

IN THE

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No. ————

COLEMAN ULLNER,

Appellant,

v.

THE STATE OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

Appellant appeals from the final orders of the Supreme Court of Ohio entered May 21, 1958, overruling appellant's application for rehearing, and its judgments entered April 30, 1958, affirming the judgments of the Court of Appeals of Butler County, Ohio, which affirmed the judgments of the Common Pleas Court of Butler County, Ohio, which affirmed the judgments of conviction of appellant of violations of the Sunday closing laws by the Municipal Court of the City of Hamilton in Butler County, Ohio, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeals and that substantial constitutional questions are presented. This single jurisdictional statement is filed pursuant to subparagraph 3 of Rule 15 of this Court.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 167 O. S. 521, 150 N. E. (2d) 413. The opinion of the Court of Appeals of Butler County, Ohio, is reported in 143 N. E. (2d) 849. The opinions of the Court of Common Pleas of Butler County and the Municipal Court of the City of Hamilton have not been reported. Copies of said opinions are attached hereto as Appendices "A," "B," "C" and "D." The judgment entries of the Supreme Court of Ohio and the entries of that court denying appellant's application for rehearing are attached hereto as Appendices "E" and "F."

JURISDICTION

These proceedings were initiated by the filing of affidavits by a private citizen in the Municipal Court of the City of Hamilton, Ohio, charging the appellant with the crimes of requiring a person in his employ or under his control to engage in common labor on Sunday and opening or causing to be opened a building or place for the transaction of business on Sunday, March 27, 1955, in violation of Section 3773.24 of the Revised Code of the State of Ohio. The judgment of the Supreme Court of Ohio was entered on April 30, 1958, appellant's application for rehearing was overruled by the Supreme Court of Ohio on May 21, 1958, and notices of appeal were filed in that court on August 11, 1958. The jurisdiction of the Supreme Court to review these judgments by appeal is conferred by Title 28, United States Code, Section 1257(2). These appeals raise the question whether the Ohio statute is repugnant to the First and Fourteenth Amendments to the Constitution of the United States. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in these cases on appeal: *Zorach* v. *Clauson*, 343 U. S. 306 (1952); *Winters* v. *New York*, 333 U. S. 507

(1948); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Cumberland Coal Co.* v. *Board*, 284 U. S. 23 (1931); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Superior Films* v. *Department of Education of Ohio*, 346 U. S. 587 (1954).

STATUTES INVOLVED

The statute of the State of Ohio whose validity is involved is Section 3773.24 of the Revised Code of Ohio, which reads as follows:

> "*Laboring or requiring employee to labor on Sunday.*
>
> "No person who is over fourteen years of age shall engage in common labor or open or cause to be opened, a building or place for transaction of business or require a person in his employ or under his control to engage in common labor on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.
>
> "This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.
>
> "This Section does not prevent emigrating families from traveling, watermen from landing their passengers, or keepers of toll bridges, tollgates, or ferries from attending them on Sunday."

Other statutes of the State of Ohio which are related to this question are Sections 3773.23, 3773.25, 3773.26, 3773.99, 4107.46, 4109.22, 4301.03(I), 4301.22(D), all of which are set forth in Appendix "G."

QUESTIONS PRESENTED

The following questions are presented by these appeals:

1. Does Section 3773.24 of the Revised Code of Ohio,

which was held to prevent the appellant from opening or causing to be opened a building or place for the transaction of business on Sunday and from requiring a person in his employ or under his control to engage in common labor on Sunday, constitute a law respecting the establishment of religion or prohibiting the free exercise thereof in violation of the First and Fourteenth Amendments to the Constitution of the United States?

2. Is Section 3773.24 of the Revised Code of Ohio so vague and indefinite as to deprive appellant of liberty or property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, particularly in view of the exceptions therein of "work of necessity or charity" as interpreted by the Supreme Court of Ohio in its opinion in these cases in which it said that "the word 'necessity' is an elastic one and what constitutes a work of necessity is often a question of fact dependent on the circumstances surrounding the particular case?"

3. Does Section 3773.24 of the Revised Code of Ohio deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States in that the legislature of the State of Ohio has provided so many exceptions to said law that appellant is unduly discriminated against?

4. Does the fact that the administrative and enforcement officers of the City of Hamilton and State of Ohio have consistently failed to enforce the provisions of Section 3773.24 of the Revised Code of Ohio and related sections relating to Sunday activities with respect to businesses and employment in general and businesses similar to appellant's in particular, in and about the City of Hamilton, constitute undue discrimination against appellant, denying him the equal protection of the laws?

STATEMENT OF THE CASE

The proceedings herein were begun by affidavits filed in the Municipal Court of the City of Hamilton in Butler County, Ohio, neither of which was filed by a police or other enforcement officer but by an attorney at law who went to the store that was operated by an Ohio corporation of which the appellant was president on Sunday, March 27, 1955, for the specific purpose of making purchases of merchandise (Record, p. 51). The affidavits (Supplemental Record, pp. 3 and 4) charged the appellant with opening or causing to be opened a place of business on Sunday and with requiring a person in his employ or under his control to engage in common labor on Sunday, in violation of law. Both affidavits said that the business or work was not a work of necessity or charity and that the appellant did not consistently observe the seventh day of the week as the Sabbath, but there was no proof of this latter point. The two cases were tried together. Prior to the introduction of evidence in either case the defendant moved to dismiss and demurred to said complaints. One of the grounds of the demurrer was that the statute involved violated the First and Fourteenth Amendments to the Constitution of the United States on the grounds of the tendency to establish a religion and undue discrimination in enforcement and because of other statutes exempting various occupations and persons (R. 32, *et seq.*).

The complaining witness is an attorney (R. 53). On the day in question he went to Rink's Bargain City and saw a police officer directing traffic in front of the store (R. 44). He went in contemplation of the proceedings in question (R. 51). The merchandise on sale consisted of sporting goods, garden tools, men's and women's clothing, hardware, garbage cans, kitchen utensils, chairs and costume jewelry, as well as some automotive equipment (R. 49, 50).

An attempt on cross examination to show the class of persons who were making purchases, in order to demonstrate that the operation was a work of necessity, was ruled out by the court (R. 51). Counsel were also prevented from showing that the witness was employed to make the purchases (R. 52).

There was no evidence that the appellant had opened the store on the day in question. The evidence was that there were five persons, none of them identified, who had the authority to open it (R. 65). The court apparently thought that the fact that the business was being operated by a corporation of which appellant was president was sufficient evidence on this subject.

As to employment, the only employee who testified, Isadore Bier, testified that he was employed not by appellant but by appellant's brother and that when he was hired he had a choice of working either Sunday or Wednesday and he took Wednesday off (R. 83). He said no one required him to work on Sunday, March 27, 1955 (R. 84).

The witness was asked about his working previously on Sundays at another department store in Hamilton, Ohio, but this evidence was refused by the court (R. 85). The court also refused to permit him to testify about other stores and factories that were open on Sundays in and around Hamilton to his personal knowledge and a proffer was made of a list of those stores and factories (R. 86, 110). These show the discrimination against appellant.

Appellant was convicted and on appeals his convictions were affirmed successively by the Common Pleas Court of Butler County, the Court of Appeals of Butler County and the Supreme Court of Ohio. In all of these courts the constitutional questions were raised.

In the Supreme Court of Ohio the constitutional questions relating to religion and discrimination were expressly passed upon in the first and third paragraphs of the sylla-

bus which represent the law in the State of Ohio, *State, ex rel. Canada* v. *Phillips*, 168 O. S. 191 (Advance Sheets of Ohio Bar for July 14, 1958), 151 N. E. (2d) 722. In the second paragraph of the syllabus the Supreme Court said:

> "'Work of necessity or charity' is exempted from the operation of Section 3773.24, Revised Code. The word, 'necessity,' is an elastic one, and what constitutes work of necessity is often a question of fact dependent on the circumstances surrounding the particular case."

This interpretation of the statute by the Supreme Court first demonstrated a vagueness that, in the opinion of counsel, rendered the statute so vague as to be in violation of the Fourteenth Amendment under the decisions of this Court. Counsel for appellant, therefore, immediately raised this question of vagueness in an application for rehearing filed in the Supreme Court of Ohio (R. 156, *et seq.*).

THE QUESTIONS ARE SUBSTANTIAL

The attack in this case is on the Sunday blue laws from various points of view. In the first place we claim that they violate the religious guarantees of the First Amendment as incorporated in the Fourteenth Amendment to the Constitution of the United States. In the second place we claim that by reason of the interpretation of "work of necessity" as indefinite, by the Supreme Court of Ohio, they do not satisfy the guarantee of definiteness required in a criminal statute by the due process clause of the Fourteenth Amendment. In the third place the exemptions that have been made in such laws since they were originally enacted constitute undue discrimination. In the fourth place the arbitrary and hit or miss methods of enforcement

(generally unenforcement) of the statutes constitute unlawful discrimination in fact.

Previous Consideration of Sunday Blue Laws By This Court.

All of these matters raise substantial questions under the Fourteenth Amendment to the Constitution of the United States which should be passed on by this Court so that they may be set at rest one way or another. This Court has delivered opinions on the Sunday blue laws in only two cases, *Hennington* v. *Georgia*, 163 U. S. 299 (1896), and *Petit* v. *Minnesota*, 177 U. S. 164 (1900). In the former case the question involved was whether the running of a freight train on Sunday, contrary to the Georgia statute, constituted an interference with interstate commerce. The Court upheld the law. No question was raised as to whether it tended to establish a religion or interfere with the freedom of religion, since at that time this Court held that the First Amendment imposed restrictions only on the federal legislature and authorities, and not on the states. *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907); *Prudential Ins. Co.* v. *Check*, 295 U. S. 530, 543 (1922). It was not until 1925, in *Gitlow* v. *New York*, 268 U. S. 652, that this Court decided that the guarantees of the First Amendment, incorporated in the Fourteenth Amendment, apply to the states as well as to the federal government.

In *Petit* v. *Minnesota*, *supra*, the law considered provided that all labor on Sunday was prohibited excepting works of necessity or charity. The legislature provided that keeping open a barber shop on Sunday should not be deemed a work of necessity or charity. The question was whether this was unduly discriminatory, in violation of the Fourteenth Amendment. This Court held that it was reasonable classification and, therefore, constitutional. The

guarantees of the First Amendment were not raised in that case either.

Recently this Court has been asked to consider the constitutionality of blue laws of various states in the following cases and has refused to do so:

> *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. (2d) 184, appeal dismissed 341 U. S. 907 (1951, October term 1950, No. 640). While several of the questions raised in the instant appeal were mentioned in that case, the record on appeal in this Court shows (page 92) that counsel in the trial court said he was not contesting the constitutionality of the state law, but "we contest only its constitutionality with respect to one who observes Saturday as his day of rest." That question is not involved in the instant case.
>
> *Taylor* v. *Pine Bluff*, 226 Ark. 309, 289 S. W. (2d) 679, *certiorari* denied 352 U. S. 894 (October term 1956, No. 324). The only complaint in that case was discrimination in the enforcement as it was claimed that the statute, though general, was enforced only against grocery stores. The petition for *certiorari*, page 3, says:
>
> > "The Arkansas Statute involved is valid, because on its face it is not discriminatory for it prohibits every kind of business from staying open on Sunday."
>
> *Hickinbotham* v. *Williams*, 227 Ark. 126, 296 S. W. (2d) 897, *certiorari* denied 353 U. S. 961 (1957, October term 1956, No. 923). The only question involved in this case was whether the petitioner could be fined for contempt for violating the injunction against opening his grocery store on Sunday.
>
> *Gundaker Central Motors Inc.* v. *Gassert*, 23 N. J. 71, 127 A. (2d) 566, appeal dismissed 354 U. S. 933 (1957, October term 1956, No. 934). No question under the First Amendment was raised in this case. It involved

the Sunday closing of dealers in motor vehicles. The trial court had held this statute unconstitutional because of discrimination, but the Supreme Court of New Jersey upheld it largely on the ground of the potential traffic accident hazard.

There is now pending in this Court the case of *Grochowiak* v. *Pennsylvania*, on appeal from the decision of the Superior Court of Pennsylvania reported in 184 Superior Court 522 and 136 A. (2d) 145 (1957), No. 166, October term 1958. That case involves the closing on Sunday afternoon of a moving picture theater.

Notice of appeal from the same decision of the Supreme Court of Ohio of which this appellant is complaining has already been fled in the Supreme Court of Ohio by counsel for Messrs. Kidd and Mills who were convicted in the Municipal Court of Cincinnati in Hamilton County, Ohio. That case involves the closing on Sunday of a grocery store in a poor neighborhood of that city.

The Recurrence of a Question Has Been Recognized By This Court as a Ground for Consideration on the Merits.

In *Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284, 77 S. Ct. 1166 (1957), this Court was presented with one more in a long series of cases in which it had been required to consider the limits imposed by the Fourteenth Amendment on the power of a state to enjoin picketing. It had granted a motion to dismiss for lack of a substantial federal question in a similar case. In view of the recurrence of the question this Court thought it advisable to grant *certiorari* (page 287 of 354 U. S.).

In considering the blue laws of the various states we cannot turn back the clock to colonial times when they were first enacted or even to 1868 when the Fourteenth Amendment was adopted, but we must consider them in the light of their full development and present place in American

life throughout the country. To paraphrase this Court's opinion in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), at pages 492 and 493, only in this way can it be determined if the Sunday work and closing laws deprive this plaintiff of the equal protection of the laws, as well as other constitutional guarantees. See Editorial Note, "Sunday Blue Laws: An Analysis of their Position in our Society" in 12 Rutgers Law Review 505 (Spring 1958), and "Sunday Statutes in a Modern Community," 61 Yale Law Journal 427.

The Ohio Blue Laws Are Laws Respecting the Establishment of Religion.

The first statutory reference to Sunday activities in the Ohio territory is in the laws enacted by the governor and judges of the North-West Territory in 1792, 1 Laws of the North-West Territory 27. The act in question reads:

"First Day of the week.

"Whereas mankind in every stage of informed society, have consecrated certain portions of time to the particular cultivation of the social virtues, and the public adoration and worship of the common parent of the universe: and whereas a practice so rational in itself, and conformable to the divine precepts is greatly conductive to civilization as well as morality and piety; and whereas for the advancement of such important and interesting purposes, most of the christian world have set apart the first day of the week, as a day of rest from common labours and pursuits; it is therefore enjoined that all servile labour, works of necessity and charity only excepted, be wholly abstained from on said day."

This law, as amplified and amended from time to time by the legislature, has been carried through to the present sections 3773.23 to 3773.26, inclusive, of the Revised Code of Ohio.

In 1829 and 1830 there was an attempt by various religious organizations to have the United States Congress amend the Postal Department law to prohibit delivery of letters and other operations on Sunday. Senator Richard M. Johnson of Kentucky, later Vice-President of the United States, made committee reports both to the Senate and the House on the subject, in which he expressed the opinion that such a prohibition would constitute a legislative decision of a religious controversy. The reports are set forth in American State Papers and Related Documents on Freedom of Religion, 4th Revised Edition, published in 1949 for the Religious Liberty Association, Washington, D. C., beginning at page 210. See also American State Papers, Class VII, Post Office Department, pp. 211, 212 and 229-31. The reports were concurred in by Congress. It is significant that the Congress has never adopted a Sunday closing law for the District of Columbia.

For a modern statement regarding Sunday closing laws see a quotation from Mayor Phil Van Every of Charlotte, North Carolina, in 52 Liberty, a Magazine of Religious Freedom, 26 (first quarter 1957), in breaking a tie vote of council to defeat a proposed Sunday closing ordinance. See also A Critical History of Sunday Legislation from 321 to 1888 A. D. by A. H. Lewis, D. D., published in New York by D. Appleton & Co. in 1888, pages viii and ix of the preface.

The exception from the operation of the Sunday closing law of those who "conscientiously observe the seventh day of the week as the sabbath" (R. C. Sec. 3773.24) shows a religious test for exceptions to the act. The provisions of the Sunday closing laws which permit professional baseball, motion picture exhibitions and gun club trap shooting only after noon on Sunday (R. C. Secs. 3773.23 and 3773.26) demonstrate that their purpose is to encourage church attendance on Sunday morning.

The decisions of this Court in *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), and *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), as well as the language in *Everson* v. *Board of Education*, 330 U. S. 1 (1947) at pages 15 and 16, and various language in the opinions rendered by the justices of this Court in *Zorach* v. *Clauson*, 343 U. S. 306 (1952), along with the history of the blue laws in Ohio and their provisions in the light of modern living conditions, require this Court to review them in connection with the religious guarantees of the First Amendment. See also *United States* v. *Ballard*, 322 U. S. 78 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

The Statute as Interpreted By the Supreme Court of Ohio Is Not So Explicit That All Men Subject to Their Penalties May Know What Acts It Is Their Duty to Avoid.

An act so indefinite violates the guarantees of the Fourteenth Amendment to the Constitution of the United States. In *United States* v. *Brewer*, 139 U. S. 278 (1891), Mr. Justice Blatchford said at page 288:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

In the instant case the Supreme Court of Ohio said that the word "necessity" was an elastic one and that what constituted work of necessity was often a question of fact dependent on the circumstances surrounding the particular case. Paragraph 2 of syllabus, 167 O. S. 521. Judge Zimmerman, in delivering the opinion said:

> "Of course, recognition and enforcement of the law (the Sunday closing law) depend largely upon the

> sentiment in a locality and the attitude of the law enforcement agencies of that community (pp. 527, 528)."

Whether a man can be convicted under the statute in question might depend on what was the sentiment of the judge or jury in that locality at the time of his trial. (See R. pp. 162 and 166 *et seq.*)

In the leading case of *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921), which involved the constitutionality of the Lever Act, Section 4 of the Federal Food Control Act of 1917, as amended in 1919, making it a crime for any person to make "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," this Court declared that the Act did not fix an ascertainable standard of guilt or adequately inform the persons accused of violation of the nature and cause of the accusation against them. The Court said at page 89:

> "In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

In *Musser* v. *State*, 333 U. S. 95 (1948), this court remanded to the Supreme Court of Utah a case in which the appellant had been convicted for conspiracy to "commit acts injurious to public morals." At page 97 this court said:

> "Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order."

See also, *Winters* v. *New York*, 333 U. S. 507 (1948); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210 (1932); and *Connally* v. *General Const. Co.*, 269 U. S. 385 (1926).

The Provisions of Sections 3773.24 and Related Sections of the Revised Code of Ohio Are Unduly Discriminatory.

(1) R. C. Sec. 3773.23 (App. 29a) permits the playing of baseball and the exhibition of motion pictures on Sunday except in the forenoon, but it does not permit football, basketball, hockey or other sports or exhibition by television or broadcasting by radio, and it expressly prohibits theatrical performances.

(2) R. C. Sec. 3773.24 is limited to engaging in "common labor" thereby permitting all other labor. This section also provides that it does not apply "to persons who conscientiously observe the seventh (7th) day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday."

(3) R. C. Sec. 3773.26 (App. 29a) permits the use of hunting instruments in trap shooting in the afternoon conducted under the auspices of a recognized hunt, trap shoot, rifle or game club of the State.

(4) R. C. Sec. 4301.22(D) (App. 34a) permits the sale of intoxicating liquor on Sundays until 2:30 A.M. Eastern Standard Time. The sale of beer and other malt beverages containing not more than 3.2 per cent of alcohol by weight is permitted all day Sunday under permits issued by virtue of R. C. Sec. 4301.03(I) (App. 34a).

(5) R. C. Sec. 3773.24 does not apply to persons under the age of fourteen (14) years.

(6) In 1949 (123 O. L. 55) the legislature in amending General Code of Ohio Section 13049, now R. C. Sec. 3773.23, eliminated the prohibition against "tenpins or other games of similar kind."

(7) In 1937 (117 O. L. 539), G. C. Sec. 1008-2, now R. C. Sec. 4107.46 (App. 30a), was enacted. This provided that no employer shall employ a female for more than forty-eight hours in any one week, or eight hours in any one day, or for more than six days in any calendar week, with certain exceptions. Subsection (C) of this section provides:

> (C) A female may be employed in more than one place of employment provided the aggregate number of hours such female is employed does not exceed eight in any one day or forty-eight in any one week.

(8) At the same session of the legislature Section 12996 of the General Code, now R. C. Sec. 4109.22 (App. 32a), was enacted (117 O. L. 543), which prohibited the employment of a boy under eighteen or a girl under twenty-one in connection with certain establishments or occupations, for more than six days in any calendar week, for more than forty-eight hours in any calendar week and for more than eight hours in any one day.

These sections contain no reference to any particular day of the week and, therefore, presumably persons could work on Sundays provided they did not work another day of the week. As a matter of fact, that is what happens in a great many manufacturing establishments and other lines of business in Ohio.

The Florida Supreme Court in the decisions of *Kelly* v. *Blackburn*, 95 S. (2d) 260 (Fla., 1957), and *Henderson* v. *Antonacci*, 62 S. (2d) 5 (Fla., 1952), had no difficulty in holding discriminations less than these rendered their Sunday closing law unconstitutional.

See *Morey* v. *Doud*, 354 U. S. 457 (1957) and cases therein cited. In that case this Court said at page 466:

> "Of course, distinctions in the treatment of business entities engaged in the same business activity

may be justified by genuinely different characteristics of the business involved. This is so even where the discrimination is by name. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences.' "

The Appellant Is Denied the Equal Protection of the Law By Reason of the Arbitrary Enforcement Against Him While Violations By the General Public Are Consistently and Deliberately Disregarded.

The appellant attempted at the trial to show that there was this systematic discrimination by public officials but this evidence, on objection of counsel for the appellee, was refused and the proffer was made (R. 85, 86, 110). Gasoline stations are open on Sunday all over the State of Ohio. These cannot be classed as works of necessity as there is no requirement that people travel on that day and for the small amount of gasoline that would be needed to perform necessary works within a small range of one's home, one could fill one's automobile tank the day before, just as the lower courts say that one must lay in one's groceries and other necessary supplies the day before Sunday. Furthermore, so-called drugstores that sell the same kind of merchandise as the appellant was selling are open all over the cities of Ohio on Sunday without interference from public authorities. In fact, their operation has been held to be a work of necessity. Factories do not hesitate to work overtime on Sunday and there is provision for this in collective bargaining agreements with unions. Used car lots are open, automobile dealers and realtors operate on Sunday. Public and private fishing lakes are open on Sunday though R. C. Sec. 3773.25 specifically probibits hunting and fishing on Sunday. R. C. Sec. 1541.07 provides in part:

"The lakes named in section 1541.06 of the Revised Code shall *at all times* be open to the public as resorts

for recreation and pleasure, including *hunting, fishing,* and boating." (Emphasis added.)

We have previously adverted to professional football, basketball, hockey, and theatrical performances that operate on Sunday and the list could be extended indefinitely.

Even the operation in question in the instant case was not ordered closed by public officials on Sunday (a policeman was directing traffic outside [R. 44]) but the information was filed by an attorney who was obviously acting for some private individual or group.

In other words the general attitude of public officials throughout the State of Ohio is to disregard the Sunday closing laws and the only time that they are enforced is not for the benefit of the health, safety, morals, or welfare of the public, but merely to serve some private end of a competitor or other small group. This is typical of the enforcement of the Sunday Blue Laws. See 12 Rutgers Law Journal, cited *supra,* at page 508.

An alleged police regulation, even though deemed to be valid when enacted, may become unconstitutional by reason of later legislation or the operation of later events. *Abie State Bank* v. *Bryan,* 282 U. S. 765 (1931).

Such discriminatory enforcement of a statute denies the appellant the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23 (1931); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

CONCLUSION

The so called blue laws, which attempted to prohibit human activity not connected with religious worship on Sunday, have been tolerated in modern times because no serious attempt has been made to enforce them by public officials and pressure groups have persuaded the legisla-

tures to adopt exceptions which bear no reasonable relation to their avowed purposes. Where they have been enforced the effort has been sporadic and discriminatory. In many instances the attempt at enforcement is made by private individuals to suppress competition.

This Court should review their constitutionality in the light of modern developments in the social and economic structure and of the more recent opinions of this Court. If they are to be held constitutional in proper cases, the lines of demarcation should be established. As now existing, interpreted and enforced (or unenforced) in Ohio they transgress the constitutional limits of the Fourteenth Amendment. The Court should consider the case presented on its merits.

Respectfully submitted,

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